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No. 95012-1

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

WAYLON JAMES HUBBARD,
Petitioner.

**MEMORANDUM OF *AMICI CURIAE* AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON, WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, and
WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF
PETITION FOR REVIEW**

ACLU OF WASHINGTON
FOUNDATION

Nancy Talner, #11196
Prachi Dave, #50498
901 5th Avenue, Suite 630
Seattle, Washington 98164
(206) 624-2184
talner@aclu-wa.org
pdave@aclu-wa.org

WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

Mark W. Muenster, # 11228
1010 Esther Street
Vancouver, WA 98660
(360) 694-5085
markmuen@ix.netcom.com

WASHINGTON DEFENDER
ASSOCIATION

Hillary Behrman, #22675
110 Prefontaine Pl. S, Suite 610
Seattle, WA 98104
(206) 623-4321
Hillary@defensenet.org

Attorneys for Amici Curiae

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I. INTEREST OF *AMICI CURIAE*

The identity and interest of *Amici*, American Civil Liberties Union (“ACLU”), Washington Association of Criminal Defense Lawyers (“WACDL”), and Washington Defender Association (“WDA”) are set forth in the Motion for Leave to File, which accompanies this Memorandum.

II. ISSUES TO BE ADDRESSED BY *AMICI*

Whether the effective date of a certificate and order of discharge under RCW 9.94A.637 is the date for which there is verification that a defendant has satisfied the conditions of their sentence, as the trial court concluded, or whether instead the effective date is the much later date when the court received notice of sentence completion.

Whether the Court of Appeals’ interpretation of RCW 9.94A.637, which causes considerable delay in eligibility for vacating a criminal record and significant harmful consequences to employment opportunities, is an issue of substantial public interest such that review by this Court is warranted.

III. STATEMENT OF THE CASE

Mr. Hubbard pled guilty to possession of stolen property on October 29, 2004. By approximately March 9, 2005, the Department of Corrections (DOC) had terminated its supervision of Mr. Hubbard, at which time DOC had certified that he had completed 55 of the 120 community service hours

ordered as part of his sentence. Mr. Hubbard completed the remainder of those hours at Pacific Aging Council Endeavor (PACE), before that entity shut down in May 2011. This fact was attested to by Shelley Steveson, a Site Manager at PACE who remembers Mr. Hubbard completing his hours before PACE closed. By February 25, 2013, Mr. Hubbard had completed all of the terms of his sentence, including paying off his legal financial obligations (LFOs). Mr. Hubbard's petition for a Certificate of Discharge (COD) included evidence of his completion of sentence terms by February 25, 2013, and requested that the COD be dated to that date.

The trial court did that, but the Court of Appeals reversed, holding that the superior court erred by entering an effective date to the COD that preceded its receipt of adequate notice and verification that Mr. Hubbard had satisfied the conditions of this sentence. The petition for review squarely presents this Court with the opportunity to address the flawed statutory construction of the Court of Appeals barring the trial court from dating the COD as of the date of completion, and the issues of substantial public importance implicated by such an interpretation of RCW 9.94A.637.

IV. ARGUMENT

A. **The Court of Appeals’ Flawed Interpretation of RCW 9.94A.637 Implicates Issues of Substantial Public Interest that Should be Settled by the Supreme Court**

RCW 9.94A.637 describes the procedures for obtaining a COD. A COD confirms that felony sentence conditions have been completed and triggers the “waiting period” for vacating the conviction record for those offenses eligible for vacation. RCW 9.94A.640. The effective date of the COD plays an enormous role in the relief that individuals may access to free themselves of the stigma of their criminal convictions. As the petition for review and this brief explain, the statute’s language does not preclude a court from entering an effective date on the date sentence completion occurred, and this proposition is supported by the rule of lenity.

Mr. Hubbard was not under supervision at the time that he completed the requirements of this sentence and therefore RCW 9.94A.637(1)(c) applies. It provides as follows:

(c) When an offender who is subject to requirements of the sentence in addition to the payment of legal financial obligations either is not subject to supervision by the department or does not complete the requirements while under supervision of the department, it is the offender’s responsibility to provide the court with verification of the completion of the sentence conditions other than the payment of legal financial obligations. When the offender satisfies all legal financial obligations under the sentence, the county clerk shall notify the sentencing court that the legal financial obligations have been satisfied. When the court has received both notification from the clerk and

adequate verification from the offender that the sentence requirements have been completed, the court shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.

While the statute is not ambiguous about *when* the court can act, namely when it has received the appropriate notification from the clerk and from the former defendant, it is silent about *how* the court should act when it gets that information. The court shall discharge the defendant, and issue the COD to the former defendant. That much is clear. What the statute does not speak to is the question of when the court issues the Certificate, what should its effective date be? The statute does not say the court shall provide the offender with a COD *which is effective only on the date the court is presented with the appropriate proof*. RCW 9.94A.637. It merely says the court shall “provide the offender with a certificate of discharge by issuing the certificate to the offender in person....” There is nothing in the statute which prohibits the court from issuing a COD which reflects the actual date of completion of the sentence, rather than the date that the motion is filed with the court requesting the discharge. And, there is nothing in the statute that directs a court to date a COD only as of the date that the court received proof that the individual has completed the terms of their sentence.

However, contrary to this common sense reading of the statute, the

Court of Appeals decision holds that the language of this section means that the Superior Court can only issue a COD which is effective on the date it receives notification of a defendant's completion of the terms and conditions of the sentence. When a person is no longer under DOC supervision, the notification often does not occur until a former defendant files their own motion for the COD, even though the sentence may actually have been completed years earlier, as was the case with Mr. Hubbard.

Many WACDL members have clients who are eligible for a COD but were never informed of their eligibility until they discussed the matter with an attorney. Individuals are not, as a matter of routine, advised regarding the process to obtain a COD under the law and therefore frequently find themselves in a position whereby they have either been eligible to obtain a COD for a long time, or do not know the eligibility criteria. Based on the language of the statute, there should be no obstacle for a Superior Court to issue a COD which recognized as its effective date the date of the actual completion of the sentence. Indeed, in *amici's* experience in obtaining numerous CODs, courts and prosecutors around the state routinely agree with this interpretation of the statute. This effective date is often several years earlier than when the motion for the COD is filed, and it reflects the completion date confirmed by the evidence. The Court of Appeals interpretation of this statute, however, would end up

disadvantaging the very population that the COD was intended to benefit by preventing them from obtaining a COD dated at the time that they completed their sentence.

Further, common sense dictates that the legislature did not intend to bind the courts as to when a COD should issue in the case of individuals who are not under custody and supervision of DOC because it would result in widely diverging outcomes between those under supervision, and those not being supervised. In this case, reading a requirement into the statute that CODs are effective only as of the date that the court receives notice that conditions of the sentence have been completed would result in individuals who are in the community obtaining a COD *later* than those under DOC supervision. The resulting impact would be to disadvantage one group of COD-seekers over another without any indication that the legislature so intended.

Even if the Court views the statute as ambiguous as to the effective date of a COD, the rule of lenity additionally renders the Court of Appeals interpretation erroneous. Either way, review to correct the interpretation of the statute is warranted.

B. The Court of Appeals Interpretation of RCW 9.94A.637 Reduces Access to the Certificate of Discharge for Previously Convicted Individuals and Creates Concerns of Substantial Public Interest that Should be Addressed by this Court

An issue of great public importance and wide impact is presented because of the central role played by the COD in the reentry process for former offenders. The COD is a necessary prerequisite to vacate a record of conviction and its issuance starts a clock which runs for five or ten years, depending on whether a felony was Class C or Class B, respectively, after which the former offender may move to vacate their conviction under RCW 9.94A.640. Further, the issuance of a COD restores other rights that are lost as a matter of law because of a felony conviction.¹

The number of people affected by the availability of a COD ranges in the thousands; with the Washington State Courts caseloads reports counting total criminal case convictions in superior court for 2016 at 29,128. Wash. Courts, Caseloads of the Courts of Washington, 2016 Ann. Rep., <https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&req=a&tab=criminal&fileID=crmcvtyr>.

The ability to vacate a prior conviction is critically important to the lives of previously convicted individuals because it releases them from the

¹ RCW 9.94A.637(5) provides in part as follows:
“(5) The discharge shall have the effect of restoring all civil rights not already restored by RCW 29A.08.520, and the certificate of discharge shall so state.”

“penalties and disabilities resulting from the offense.” RCW 9.94A.640(3). Once a conviction has been vacated, the individual may freely state that “[f]or all purposes, including responding to questions on employment applications... that the offender has never been convicted of that crime.” *Id.* Individuals with prior convictions face numerous challenging obstacles to their reentry process, including the fact that employers routinely consider criminal history in deciding whether to employ a person. Soc’y for Human Res. Mgmt., *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* (2012), available at <http://bit.ly/2wJxh7U>. The vacate statute is a longstanding avenue for relief provided by the Legislature, and the Court of Appeals ruling here threatens that legislative scheme.

Access to housing and employment has significant impacts in reducing recidivism, but these options are difficult for those with conviction histories to access. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 957-58 (2003) (demonstrating that when applicants inform prospective employers about their prior convictions, the callback rate dropped from 34 to 17 percent for white applicants, and from 14 to five percent for black applicants.) The ability to vacate prior convictions opens up avenues for employment and housing that could have a significant impact on the massive numbers of people living with convictions in Washington, and reduce the numbers of people returning to prison.

A delay in the effective date of the issuance of the COD, through no fault of the offender, is a mammoth impediment to the reentry process. The COD statute is inextricably linked to the ability to vacate a conviction, a statutory creation that was intended to confer a benefit upon individuals who complete their sentences. Reading that same statute in a manner that instead imposes the additional burden of a delayed effective date of the COD defies the intent of the statutory scheme. The statute should not be construed to create such an artificial obstacle.

C. This Case Involves a Significant Question of Law Under the State and Federal Constitutions Involving Mr. Hubbard's Protected Liberty Interest in Employment

As the petition for review explains, because the effective date of the COD is tied to the date when employment barriers are reduced under the vacate statute, a significant constitutional right is at stake. The Supreme Court has recognized that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity” that the Constitution was meant to protect. *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct 7 (1915); *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 519 29 P.3d 689 (2001) (due process requires proof by clear and convincing evidence in a medical disciplinary proceeding.) Mr. Hubbard and others like him should be able to take advantage of the remedial nature of the COD and the vacate process

provided by the Legislature based on an effective date of sentence completion, thereby freeing him of the restrictions surrounding his prior conviction, and access his constitutionally protected interest in employment.

V. CONCLUSION

Mr. Hubbard's petition for review should be granted because the Court of Appeals interpretation of the statute undermines legislative intent and raises an important statewide issue affecting the rights of thousands of people with criminal records to be able to move on in their lives. Acceptance of review will give guidance to Superior Court judges throughout the state on how to properly issue a COD, because that is the gateway to having a felony vacated and increasing the former offender's chances of finding employment and housing. A significant constitutional interest is also at stake. The criteria of RAP 13.4(b) are met in this case, and the petition should be granted.

Respectfully submitted this 20th day of November 2017.

By: /s/Nancy Talner

Nancy Talner, # 11196
Prachi Dave, # 50498
AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION
901 5th Ave, Suite 630
Seattle, WA 98164

Tel: (206) 624-2184
talner@aclu-wa.org
pdave@aclu-wa.org

By: /s/Mark W. Muenster

Mark W. Muenster, WSBA # 11228
WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1010 Esther Street
Vancouver, WA 98660
Tel: (360) 694-5085
e-mail markmuen@ix.netcom.com

By: /s/Hillary Behrman

Hillary Behrman, # 22675
Washington Defender Association
110 Prefontaine Pl. S, Suite 610
Seattle, WA 98104
Tel: (206) 623 4321
Hillary@defensenet.org

***Counsel for Amici Curiae American
Civil Liberties of Washington
Foundation, Washington Association
of Criminal Defense Lawyers, and
Washington Defender Association.***

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